TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1962

No. [redacted] 13

DOYLE SMITH, PETITIONER,

vs.

EVENING NEWS ASSOCIATION.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI FILED MAY 12, 1961
CERTIORARI GRANTED MARCH 26, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 89

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MAY 15, 1962

[fol. 1]

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

48675

DOYLE SMITH, Plaintiff and Appellant,

vs.

EVENING NEWS ASSOCIATION, Defendant.

Appellant's Appendix

IN THE CIRCUIT COURT OF WAYNE COUNTY, MICHIGAN

CALENDAR ENTRIES

1956		
Oct.	9.	Praecipe filed; summons issued.
Oct.	9.	Declaration filed.
Oct.	11.	Summons returned served; filed.
Oct.	24.	Answer filed.
Nov.	1.	Reply to defendant's answer filed.
Nov.	30.	Praecipe for causes ready for trial filed.
1957		
May	29.	Depositions filed.
Dec.	6.	Amended declaration filed.
Dec.	6.	Interrogatories to defendant filed.
1958		
Jan.	2.	Deposition Filed.
Jan.	2.	Second amended declaration filed.
Feb.	17.	Pre-trial statement signed and filed.
Mar.	6.	Stipulation adjourning case to May, 1958, filed.
May	12.	Assigned to Judge Culehan.

1960

Feb. 1. Opinion of the Court, signed and filed, Judge Culehan.

Feb. 1. Brief in support of motion to dismiss for lack of jurisdiction.

Feb. 1. Brief in opposition to motion to dismiss for lack of jurisdiction.

Feb. 1. Reply brief of defendant in support of motion to dismiss for lack of jurisdiction.

[fol. 2]

Feb. 11. Order for dismissal signed, Judge Miles N. Culehan.

Feb. 11. Proof of service filed.

Mar. 1. Notice of performance of requisite acts on appeal filed.

Mar. 1. Proof of service filed of claim of appeal, notice of performance of requisite acts on appeal.

Mar. 1. Certificate that amount in controversy exceeds the sum of $500.00 signed, filed, Miles N. Culehan.

Mar. 1. Claim of appeal filed.

IN THE CIRCUIT COURT OF WAYNE COUNTY, MICHIGAN

SECOND AMENDED DECLARATION—Filed January 2, 1958

Now comes the above-named plaintiff, Doyle Smith, by his attorneys, Rothe, Marston, Mazey, Sachs & O'Connell, declaring against the Evening News Association, a Michigan corporation, defendant herein, in an action of assumpsit, says as follows:

1. That the plaintiff is and at all times mentioned herein was a resident of the City of Detroit, County of Wayne, State of Michigan.

2. That the defendant is a Michigan corporation having its principal offices and place of business in the City of Detroit, County of Wayne, State of Michigan.

3. That plaintiff is, and at all times mentioned herein was, an employee of the defendant, Evening News Association.

4. That among other employees, the following are and have been similarly employees of the defendant corporation:

[fol. 3]

Inez N. Bailey	Robert L. Beamon
Tyler H. Boykin	Floyd Brown
Alvin Bryant	Ulysses Chauffe
Vertical Clemons	Ruth Crosby
Lamar Dye, Jr.	Candis W. Edwards
Willie Ervin, Jr.	James P. Floyd
Columbus Gondeau	Sam Harris, Jr.
John T. Hunt	Eddie R. Jackson
Arthur N. Johnson	Edgar L. Jones
Jimmie V. Jones	Jefferson Knowles
Hoover Koger	Joseph M. Koger
Ernest Lawson	Phillip Madison
Jimmie L. Matthews	Charles May
Mitchell L. May	Warren Newton
Alma C. Offut	W. Parker
William Parks	Turner Powell
Reba Powell	Robert J. Pullen
John R. Reed	Laura L. Reed
William Rice	Mary Roberson
James Roberson	Anthony Sams
David E. Scott	Clifford Steele
James Tanner	James Tate
William Thomas	Clark Watkins
Howard Westbrook	Allen Williams
Troy Williams	

and the said employees have prior to the commencement of this action assigned their claims for wages due them by the defendants, which claims are hereinafter set forth, to the plaintiff for a good and valuable consideration.

5. That plaintiff and his assignees are, and at all times mentioned herein were, members of a labor organization, namely, the Newspaper Guild of Detroit.

[fol. 4] 6. That the Newspaper Guild of Detroit and defendant have entered into a collective bargaining agreement providing certain benefits to plaintiff and his assignees that the collective bargaining agreement concerned with herein was an agreement entered into between the parties January 1, 1954, continuing to December 31, 1955, the terms of which, by agreement of the parties, continued until January 27, 1956, at which time the parties entered into a collective bargaining agreement, effective January 1, 1956, to December 31, 1957; that the collective bargaining agreement entered in January, 1954, which by agreement was continued until January 27, 1956, contained among other things, a provision known as Article IV, Section 5, as follows:

> "5. There shall be no discrimination against any employee because of his membership or activity in the Guild."

7. That on December 1, 1955, and continuing until January 16, 1956, a group of employees of the defendant, belonging to a union other than that representing the plaintiff and his assignees, caused a strike to be called at the premises of the defendant, and that the defendant did not permit the plaintiff and his assignees to report on their regular shifts.

8. That plaintiff and his assignees during the period from December 1, 1955, to January 16, 1956, were ready, able and available for work on their regular shifts and positions, but were advised by the defendant that only a small portion of the employees would be allowed to enter the premises, and that as a result plaintiff and his assignees lost considerable money in wages.

9. That during the period from December 1, 1955, to January 16, 1956, defendant permitted employees of the Editorial Department, Business Office and Advertising De-
[fol. 5] partment, who are not covered by any collective bargaining agreement, to report on the premises even though there was no work available, and that defendant paid full wages to the above-mentioned employees during

the entire period, and that the wages paid to these employees was a sum in excess of $750,000.00.

10. That the defendant's refusal to pay full wages to the plaintiff and his assignees during the period from December 1, 1955, to January 16, 1956, and defendant's payment of full wages to the employees of the Editorial Department, Business Office and Advertising Department, during the period from December 1, 1955, to January 16, 1956, was in violation of the contract provision heretofore set forth.

11. That the said conduct of the defendant corporation has resulted in great financial loss and damages to the plaintiff and his assignees, in an amount which plaintiff cannot positively ascertain by reason of the fact that the books, records, papers and other documents evidencing the amount here in controversy are in the exclusive possession of the defendant corporation, and the plaintiff cannot accurately compute the amount without examination of such books, records, papers and other documents.

Wherefore, plaintiff claims damages in the amount of Twenty Thousand ($20,000.00) Dollars, together with interest, costs and attorney fees.

Rothe, Marston, Mazey, Sachs & O'Connell, By: William Mazey, Attorneys for Plaintiff, 3610 Cadillac Tower, Detroit 26, Michigan.

Dated: December 30, 1957.

[fol. 6]

IN THE CIRCUIT COURT OF WAYNE COUNTY, MICHIGAN

ANSWER TO SECOND AMENDED DECLARATION—
Filed October 24, 1956

Now comes the defendants, by its attorney, Butzel, Eaman, Long, Gust & Kennedy, and for answer to the Declaration herein says:

1. Defendant has no knowledge or information sufficient to form a belief with respect to the allegations in Paragraph 1 and therefore neither admits nor denies the same.

2. The allegations of Paragraph 2 are admitted.

3. The allegations of Paragraph 3 are admitted.

4. The allegations of Paragraph 4 are admitted except defendant has no knowledge or information sufficient to form a belief with respect to (i) the allegation that James Tanner, William Thomas, Troy Williams, W. J. Parker Bey, Robert J. Pullen and Clifford Steele are and have been employees of defendant, and (ii) the allegation that wages have been assigned for a valuable consideration by those named in the Declaration, and therefore neither admits nor denies such allegations.

5. Defendant has no knowledge or information sufficient to form a belief with respect to the allegations in Paragraph 5 and therefore neither admits nor denies the same.

6. The allegations of Paragraph 6 are admitted, except defendant denies the agreement provided "certain benefits to plaintiff and his assignees."

7. The allegations of Paragraph 7 are admitted except defendant denies that it did not permit plaintiff and his [fol. 7] assignees to report on their regular shifts. For further answer, reference is made to Paragraph 12 of this Answer.

8. The allegations of Paragraph 8 are denied. For further answer, reference is made to Paragraph 12 of this Answer.

9. The allegations of Paragraph 9 are admitted, except the defendant denies (i) the allegation that there was no work available for the employees of the editorial department, business office and advertising department, and (ii) the allegation that the wages paid were in excess of $750,000.

10. The allegations of Paragraph 10 are denied.

11. The allegations of Paragraph 11 are denied.

12. Further answering, defendant says:

(a) During the period covered by the declaration the Newspaper Guild of Detroit, with the acquiescence

and consent of plaintiff and his alleged assignees, arbitrarily, arrogantly and wrongfully assumed the right to determine who, when and to what extent plaintiff, his alleged assignors and its members would perform work for this defendant and this defendant has the services of Guild members only at such times as the representatives of the Guild permitted.

(b) During the period covered by the Declaration, plaintiff and such of the persons named in Paragraph 4 of the Declaration as were or had been employees of defendant refused from time to time to work for defendant.

[fol. 8] (c) From time to time during the period covered by the Declaration, plaintiff and some of the persons named in Paragraph 4 of the Declaration did work for the defendant, and plaintiff and such persons were paid in full for all work so performed.

(d) During the period covered by the Declaration, defendant did not require the services of all those persons named in Paragraph 4 of the Declaration.

(e) During the period covered by the Declaration, all work which defendant desired or required to be performed in its plant departments consisting of janitors, watchmen and elevator operators was done by individuals who were or are believed by this defendant to have been members of the Newspaper Guild of Detroit.

(f) During the period covered by the Declaration neither plaintiff nor any of his assignees ever reported for work and were refused permission to work.

(g) During the period covered by the Declaration, defendant had no obligation to permit plaintiff or any of the persons named in Paragraph 4 of the Declaration to report for work nor to work nor was defendant obligated to pay for work not performed.

(h) The Court has no jurisdiction over the subject matter of this suit.

(i) The Declaration fails to state a cause of action.

[fol. 9] Wherefore, defendant claims a judgment herein, together with costs to be taxed, against plaintiff and in favor of defendant.

Butzel, Eaman, Long, Gust & Kennedy, By: Clifford W. Van Blarcom, Attorneys for Defendant, 1881 National Bank Building, Detroit 26, Michigan.

Dated: October 24, 1956.

In the Circuit Court of Wayne County, Michigan

Reply to Defendant's Answer—Filed November 1, 1956

Now comes the above named plaintiff, Doyle Smith, by his attorneys, Rothe, Marston, Mazey, Sachs & O'Connell, and for reply to the Answer of the defendant, says:

1. Replying to Paragraph 12 of defendant's Answer, plaintiff says:

12(a) Replying to Paragraph 12(a), plaintiff denies the allegations contained therein.

12(b) Replying to Paragraph 12(b), plaintiff denies the allegations contained therein.

12(c) Replying to Paragraph 12(c), plaintiff denies the allegations contained therein.

12(d) Replying to Paragraph 12(d), plaintiff neither admits nor denies the allegations contained therein, and leaves defendant to its proofs.

12(e) Replying to Paragraph 12(e), plaintiff neither admits nor denies the allegations contained therein, and leaves defendant to its proofs.

[fol. 10] 12(f) Replying to Paragraph 12(f), plaintiff denies the allegations contained therein.

12(g) Replying to Paragraph 12(g), plaintiff denies the allegations contained therein.

12(h) Replying to Paragraph 12(h), plaintiff denies the allegations contained therein.

12(i) Replying to Paragraph 12(i), plaintiff denies the allegations contained therein.

Wherefore, plaintiff claims judgment in the amount of Twenty Thousand ($20,000.00) Dollars, together with interest, costs and attorney fees.

Rothe, Marston, Mazey, Sachs & O'Connell, By: William Mazey, Attorneys for Plaintiff, 3610 Cadillac Tower, Detroit 26, Michigan.

Dated: October 29, 1956.

In the Circuit Court of Wayne County, Michigan

Opinion on Motion of Defendant Evening News Association to Dismiss for Lack of Jurisdiction—Filed February 1, 1960

Facts

Plaintiff, individually and as assignee of forty-nine others, brings this action in assumpsit claiming damages in the amount of $20,000.00 for breach of a collective bargaining agreement made between the defendant and Newspaper Guild of Detroit (herein called "the Guild").

[fol. 11] Defendant is a Michigan corporation. It publishes a newspaper. The parties have agreed that it is engaged in interstate commerce.

Plaintiff and his assignors are all members of the Guild. They are also employees of defendant. Those members of the Guild who were employed by defendant were janitors, elevator operators and watchmen.

On December 1, 1955, and continuing until January 16, 1956, a group of employees of the defendant belonging to a union other than the Guild were on strike against defendant. Plaintiff claims that while the strike was in progress defendant permitted unorganized employees working in its editorial, business and advertising departments to report at defendant's premises and paid them their full wages. Plaintiff also claims he and those who assigned their claims to him (i.e., Guild members) were ready, able

and available for work during the strike but only a few were allowed to enter the struck premises and to work with the result that they lost considerable money in wages. Plaintiff further claims the refusal to pay full wages to Guild members plus the payment of full wages to the unorganized employees constituted discrimination against Guild members because of their membership. This he says was not only a discrimination but it is also a breach of the following covenant in the contract between the Guild and the defendant:

> "There shall be no discrimination against any employee because of his membership or activity in the Guild."

Defendant denies discrimination and partiality. It says that employees were retained in accordance with the need [fol. 12] for their services and not with reference to any membership in the Guild or any other organization; that certain aspects of the business had to be carried on at full strength and in fact at more than usual strength by reason of the strike and in spite of it; that news had to be gathered and preserved; that money had to be received and disbursed; that advertising contracts had to be serviced and that some of these activities were even increased by the strike rather than diminished.

This Court, if it proceeded to a trial on the merits, would be required to determine whether or not plaintiff and his assignees were discriminated against, by reason of their Guild membership, when defendant employed on a full time basis and paid its unorganized employees but did not do the same for all those employees who were Guild members. Such discrimination, if found to exist, would constitute an unfair labor practice under Section 8(a) of the National Labor Relations Act, as amended (herein called "the Act").

Plaintiff, and each of his assignees, failed to file a charge with the National Labor Relations Board within the six-month period contemplated in the Act. Had a charge been filed and a complaint been issued under the Act, the Board would have had the right on proper findings—not only to

reinstate but also to award back pay. (Section 10(c)). However, since plaintiff and his associates failed to file a charge no complaint can now be issued under the Act. (Section 10(b) of the Act.) Instead of filing a charge, in October of 1956—more than six months after the conclusion of the strike and the events above mentioned—plaintiff commenced this suit at law.

[fol. 13] Defendant plead that the Court has no jurisdiction over the subject matter of the suit. This defense was based upon the claim that the subject had been pre-empted by the Labor-Management Relations Act, 1947, as amended (i. e., the Act). At the opening of the trial, defendant moved to dismiss for lack of jurisdiction on the following grounds:

1. Defendant is charged with acts, which, if true, constitute an unfair labor practice as defined in the National Labor Relations Act, as amended, and

2. The National Labor Relations Board has been vested by virtue of such amended Act with exclusive jurisdiction of the subject matter.

The issue this Court is now called upon to decide, by reason of defendant's defense and motion, can be stated as follows:

> Does a state court have jurisdiction of an action at law by an employee against his employer for breach of a contract between such employer and a labor organization to which such employee belongs where the action is based upon facts which if true constitute both a breach of such contract and also an unfair labor practice under the provisions of Section 8(a) of the Act?

Opinion

Plaintiffs have charged defendant with committing what constitutes a statutory unfair labor practice of discriminating against them by reason of their union membership. This is an area which the federal government has pre-empted

and placed in the exclusive control of the National Labor Relations Board.

[fol. 14] More than twelve years ago, before the United States Supreme Court had considered the subject, the Circuit Court of Appeals for the 4th Circuit, in *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183, concluded that recompense of lost wages on account of an unfair labor practice is a matter for the labor board.

Plaintiff in this case is attempting to circumvent the exclusive remedy afforded him in the Act by declaring on the contract. It seems that he should be unable to succeed. The case of *Garner* v. *Teamsters Union*, 346 U.S. 485, 98 L. Ed. 228 (1953), held that the National Labor Relations Board has exclusive jurisdiction of unfair labor practices. In that case the plaintiff had 24 employees, four of whom were members of defendant union. Defendant engaged in what was an unfair labor practice under the Act. It placed pickets, none of whom were employees of plaintiff, at plaintiff's loading platform to induce and coerce plaintiff's employees to join the union. Drivers from other unions refused to cross the picket line, as a result of which plaintiff's business fell off as much as 95 per cent. The Supreme Court of the United States stated that this was a matter for the National Labor Relations Board, not for the state courts, and that the need for uniformity in applying the Act necessitated centralized administration in one body. Thus the state and federal courts are pre-empted from deciding unfair labor practices. The Court also discussed the importance of public and private rights, saying, at page 500:

> "We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended [fol. 15] by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded."

See also *Grimes & Hauer, Inc. v. Rollait, et al.*, 127 N.E. 203 (1955) holding, among other things, that both public and private rights are comprehended in the Act. The *Garner* case has been followed extensively and is considered to be the leading case on the pre-emption doctrine as it applies to unfair labor practices.

Weber, et al. v. Anheuser Busch, Inc., 384 U.S. 468, 99 L. Ed. 546 (1955) affirmed the *Garner* case. In that case the union struck and picketed an employer's plant to compel the employer to insert into a contemplated collective bargaining contract a clause obligating the employer to employ, for repair or replacement of machinery, only contractors who had collective bargaining agreements with that union. Employer filed charges of unfair labor practices under Section 8(b), (4), (D) of the Act. The National Labor Relations Board quashed notice of the hearing, holding that no "dispute" existed within the meaning of that subsection. Before the Board acted, the employer sought an injunction against the union in a Missouri state court alleging a secondary boycott and also a violation of Subsections (A), (B) and (D) of 8(b) (4) of the Act. A permanent injunction was issued by the State Court after the Board found no violation of Section 8(b), (4), (D). Upon certiorari to the Supreme Court of the United States, that Court said in part:

> [fol. 16] "A state may not enjoin, under its own labor statute, conduct which has been made an 'unfair labor practice' under the federal statutes. Such was the holding in the Garner case (U.S.), *supra*.
>
> The Court pointed out that exclusive jurisdiction to pass on the union's picketing is delegated by the Taft-Hartley Act to the National Labor Relations Board."

Then, after finding that the Board had not ruled that no unfair labor practice was involved but only that there was no violation of subsection (D) of Section 8(b), (4), the Court said, at page 479:

> "Respondent itself alleged that the union conduct it was seeking to stop came within the prohibitions of the federal act, and yet it disregarded the Board and

> obtained relief from a State Court. It is perfectly clear that had respondent gone first to a Federal Court, instead of the State Court, the Federal Court would have declined jurisdiction, at least as to the unfair labor practices on the ground that exclusive primary jurisdiction was in the Board. As pointed out in the Garner case, the same considerations apply to the State Courts."

And, at page 481:

> "But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal act, may be reasonably deemed to come within the protection afforded by that Act, the State Court must decline jurisdiction in deference to the tribunal [fol. 17] which Congress has selected for determining such issues in the first instance."

In harmony with these decisions, certain other cases should specifically be mentioned. The case of *Saeger* v. *Emerson Electric Mfg. Co.*, 303 S.W. 2d 35 (1957) (Certiorari denied in 355 U.S. 894), was an action to recover damages upon the theory that the employer and others had conspired to discharge plaintiffs because of union activities and in breach of their employment contract. The gist of the plaintiff's allegations was a charge of an unfair labor practice (i.e., a discrimination on account of union activities) and the damages sought were the loss of wages. The Court pointed out that with few exceptions—such as common law torts accompanied by violence—the clear import of the federal cases now is that state courts may not exercise jurisdiction as to those matters constituting unfair labor practices under the federal act. The Court held that exclusive jurisdiction was vested in the National Labor Relations Board and dismissed the case.

In *United Electrical, Radio and Machine Workers of America, et al.* v. *General Electric Co.*, D.D. 231 F. 2d 259 (1956), a union and one of its members sought injunctive

relief and damages for breach of contract due to the discharge of plaintiff because he [illegible] the Fifth Amendment, which is in effect saying the Company committed an unfair labor practice. The Court [illegible] the *Garner* decision, dismissing for lack of jurisdiction, and again made it clear that jurisdiction is vested in the National Labor Relations Board. The Court also said, at page 291, footnote 1:

> "The circumstance that the facts alleged in the present complaint, constituting an unfair labor practice, [illegible] are in the nature of a breach of contract and not, like the facts in the Garner case, in the nature of a tort, would not authorize the District Court or this court to create an exception to the Garner rule and assert jurisdiction before the Board has been asked to exercise it."

The doctrines of these cases seem to have been followed almost without exception and have left little doubt as to the exclusive nature of federal (as distinguished from state) jurisdiction over unfair labor practices. See also *Betts Mfg. Co. v. Local* [illegible] 130 N.Y.S. 2d 865 (1954); *Bearden v. Coker*, 291 S.W. 2d 790 [illegible]; [illegible] *Mfg. Co. v. International Ladies Garment Workers Union, AFL*, 269 S.W. 2d 409 (1954); *T & C* [illegible] *v. Local Union No. 328*, 355 Mich. 26; *Davidson v. Carpenters Council*, 356 Mich. 557; *Guss v. Utah*, 353 U.S. 1; *Amalgamated v. Fairlawn*, 353 U.S. 20; *San Diego v. Garmon*, 353 U.S. 26. See also the recent case of *Grand Lodge v.* [illegible], 341 Pac. 2d 989, in which an injunction was sought in the Kansas court to enjoin the violation of a collective bargaining contract expressly prohibiting "discrimination for engaging in union activity" and in which case the Court, in dismissing the complaint for lack of jurisdiction over the subject matter, because of pre-emption, reviewed the decisions and said: "*that a plaintiff may not [illegible] an action which constitutes an unfair labor practice as a contract violation and thereby circumvent the plain mandate of Congress that jurisdiction of such matters be vested exclusively in the National Labor Relations Board.*"

If the case at bar involved merely a breach of contract, without an unfair labor practice, and was instituted by the [fol. 19] union in a federal district court, then a suit could be successfully prosecuted from a jurisdictional standpoint, at least in a federal court. See *UAW, Local 286 v. Wilson Athletic Goods Mfg. Co., Inc.* (N.D.), 119 F. Supp. 948 (1950). Such, however, is not the case here. Plaintiff is suing as an individual, in a state court, for breach of contract involving an unfair labor practice, and is seeking back wages, a remedy which the National Labor Relations Board is empowered to grant under Section 10(c).

The only apparent exceptions to the presently strict preemption doctrine seem to arise in cases involving violent torts and in cases where an employee is suing the union for reinstatement. Courts allow suits in the state courts in three tortious situations: (1) Mass picketing; (2) Violence; (3) Overt threats of violence. The reason given in these cases is that if is necessary, under the state police power, to preserve the peace, safety, etc., of the state. If parties were required to wait until the National Labor Relations Board found an unfair labor practice before issuing its order, the violence, intimidation, etc., would mushroom entirely uncontrolled. Thus an exception has been made in cases where violence is involved. See *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 98 L. Ed. 1025 (1954); *United Automobile, Aircraft and Agricultural Implement Workers v. Wisconsin Employment Relations Board*, 351 U.S. 266 (1956); *Johnston, et al. v. Colonial Precision Co., Inc.* (Mass.), 128 F. Supp. 954 (1954), and, *UAW v. Russell*, 356 U.S. 634.

Counsel for plaintiff seems to rely heavily upon the *Russell* case as standing for the proposition that a state court has jurisdiction of an action by an employee against [fol. 20] an employer for breach of a collective bargaining contract which also involves an unfair labor practice. The *Russell* case is merely another example of a situation involving violence. In this case the plaintiff was forcibly prevented from crossing a picket line. Plaintiff brought an action for the tort of wrongful interference with a lawful occupation. The Court carefully confined its opinion

to situations involving violence, threats thereof, or mass picketing and referred to the *Laburnum* case.

The second exception arises in cases where a union member sues his union for restoration of his membership and/or damages due to illegal expulsion. In *Reed* v. *Curran*, 138 N.Y.S. 2d. 809 (1955), the plaintiff sued the union in a state court for reinstatement and for a declaration that his expulsion was void. His expulsion was due to a conviction of a narcotics charge fifteen years prior to his union membership. The Court held that although the National Labor Relations Board must determine the question of an unfair labor practice, state courts are not precluded from restoring membership to a wrongfully expelled member of the union. In *I.A.M.* v. *Gonzales*, 42 LRRM 2135, 356 U.S. 617 (1958), the second case on which counsel for the plaintiff so heavily relies, the state court allowed a suit by an expelled union member against his union for restoration of his membership and for damages due to his illegal expulsion. Again the Court specifically limited its decision to this type of factual situation and to suits between a union and one of its members. Mr. Justice Frankfurter took pains to point out that this was not a suit to remedy employer discrimination. He said, at page 2137:

> "The suit did not purport to remedy or regulate union conduct on the ground that it was designed to [fol. 21] bring about employer discrimination against an employee, the evil the Board is concerned to strike at is an unfair labor practice under Section 8(b)(2). * * * A state court decision requiring restoration of membership requires consideration of a judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership."

The above mentioned cases are the only apparent exceptions to the strict pre-emption doctrine as it is applied to unfair labor practices. The case at bar falls into neither category.

Plaintiff cites several other cases which, upon analysis, are found to be quite different from and not controlling of the issues involved in the case at bar. For example, the following, most of which also arose prior to the teachings in the United States Supreme Court cases of *Garner* and *Weber, et al., supra*:

(1) *Textile Workers Union v. Arista Mills*, 193 F. 2d 529 (CCA, 4th Cir. 1951). This was an action under Section 301(a) of the Act involving a dispute between *a union and an employer in a federal court*. The suit was for breach of a collective bargaining agreement. The relief asked was declaratory judgment, an injunction and damages. The dispute involved *reinstatement and seniority provisions* of a contract. The Court held for the union but not on jurisdictional grounds, saying, at page 533:

> "We do not mean to say that merely because a bargaining contract may forbid unfair labor practices, courts have jurisdiction to afford relief against them [fol. 22] under the guise of relieving against breaches of contract * * *"
>
> "We think it clear that parties may not by including a provision against unfair labor practices in a bargaining agreement vest in the courts jurisdiction to deal with matters which Congress has placed within the exclusive jurisdiction of the N.L.R.B. Where, however, substantive rights with respect to such matters as positions or pay are created by bargaining agreements, there is no reason why the courts may not enforce them even though the breach of contract with regard thereto may constitute an unfair labor practice within the meaning of this act."

In this case there was also a complaint filed with the National Labor Relations Board, a procedure absent, and vitally so, in the case at bar. This case was decided before the *Garner* case and without benefit of that opinion.

(2) *Reed v. Fawick*, D.C., 86 F. Supp. 822 (1949), also decided before the *Garner* case and also a suit in a federal court under Section 301(a) of the Act. In this case the

individual plaintiffs were dropped as parties by agreement because of Section 301(a), thus meeting the requirements of that section. This case was a suit charging an unfair labor practice of refusing to bargain collectively and the act of encouraging the organization of rival unions on the premises. The Court separated the unfair labor practice from the contract portion and took jurisdiction of the latter while declining to do so in reference to the unfair labor practice charge.

(3) *Modine Mfg. Co.* v. *I.A.M.*, 216 F. 2d 326 (CCA 6th Circuit, 1954). Again a suit in a federal court under Section [fol. 23] 301(a) by a labor union against an employer.

(4) *Ludlow Mfg. & Sales Co.* v. *Textile Workers Union*, 108 F. Supp. 45. This too is a suit between an employer and a union in the federal court under Section 301(a) of the Act.

(5) *United Telephone Co. of the West and United Utilities*, 112 NLRB 779. This case is a Board decision and it did not deal with a pre-emption problem.

By failing to invoke the proper procedure of filing a charge with the National Labor Relations Board within the six-month statutory period, by charging facts which are both an unfair labor practice as well as a contract violation, and by bringing this action in a state court, plaintiff is precluded from recovery in the instant case. The National Labor Relations Board had the power to award back pay even if there is no discharge and reinstatement problem. See Sec. 10(c). Furthermore, no specialized damages have been asked which the National Labor Relations Board would have been powerless to give. The need for uniformity in applying the provisions of the Labor-Management Relations Act still prevails over the argument that state courts should entertain suits in situations of the type present in this case. The facts, as presented, do not require immediate action as is so often the case where violent torts have been threatened or committed. Finally, in order to allow recovery on the contract, this Court would be required to find discrimination of a kind which would also be an unfair

labor practice and thus subject to correction by the National Labor Relations Board.

In view of the cases cited in this opinion, defendant's motion to dismiss for lack of jurisdiction should be granted. [fol. 24] An order may be entered consistent with this opinion.

Miles N. Culehan, Circuit Judge.

In the Circuit Court of Wayne County, Michigan

Order of Dismissal—Filed February 11, 1960

At a session of said Court, held in the City-County Building, City of Detroit, Wayne County, Michigan, this 11th day of February, A.D. 1960.

Present: Honorable Miles N. Culehan, Circuit Judge.

This Court, having considered the oral arguments in open court and the written briefs submitted by counsel for both parties on defendant's Motion to Dismiss, and having concluded that this Court lacks jurisdiction;

Now, Therefore, It Is Ordered that this cause be and the same hereby is dismissed.

Miles N. Culehan, Circuit Judge.

In the Circuit Court of Wayne County, Michigan

Certificate That Amount in Controversy Exceeds the Sum of $500.00—February 29, 1960

(Filed March 1, 1960)

I, Miles N. Culehan, Circuit Judge of the Wayne Judicial Circuit, on the hearing of the above cause, do hereby certify that the action is one at law, and that the controversy actually involves the sum of more than Five Hundred ($500.00) Dollars.

Miles N. Culehan, Circuit Judge.

Dated: February 29, 1960.

[fol. 25]

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

Appellee's Appendix

IN THE CIRCUIT COURT OF WAYNE COUNTY—MICHIGAN

PRE-TRIAL STATEMENT—Filed February 17, 1958

The plaintiff individually and as assignee of forty-nine others similarly situated, brings this action for damages for breach of collective bargaining contract with the defendant newspaper publisher. The plaintiffs are members of the Newspaper Guild of Detroit and comprise three categories of employees—janitors, elevator operators and watchmen. During the newspaper strike of December 1955 to January 1956, when the three Detroit papers were down, plaintiff claims that they were laid off, entirely because of their membership in the Guild, and that this was a discrimination which was forbidden by the contract, reading as follows (Article 4, Section 5): "There shall be no discrimination against any employee because of his membership or activity in the Guild."

This action is brought to recover money damages, the measure of which is the pay they would have received during the lay-off under the contract. The position of the defendant publisher is that when lightning struck it was necessary to make a complete readjustment of the employee situation, and in so doing the watchmen were kept on full time, as they had been before the strike, the janitors were given staggered employment, if desired, sufficient to meet the reduced needs of their service, and the same was done with the elevator operators. Obviously, defendant contends, the need for these services was reduced by reason of the drastic change in the defendant's operation, and whatever adjustment was made was made because of the [fol. 26] necessity of a readjustment and without any discrimination or partiality being involved.

Plaintiff's position is that many employees of the paper were retained on a full-time basis, and that if any were so retained it was the contractual right of all the plaintiffs to be retained on the same basis. The failure to do

this amounts, according to the plaintiff, to a discrimination based on Guild membership, in violation of the contract. By way of illustration, plaintiff contends that if all of the employees in the Advertising Department or in the Editorial Department or in the Cashier's Department were retained on a full-time basis, every member of the Guild had a right to be retained on the same basis.

Meeting this contention the defendant says that employees were retained in accordance with the need of their services and not with reference to any membership in the Guild or any other organization; that certain aspects of the business had to be carried on at full strength, and in fact at more than usual strength by reason of the strike and in spite of it; that news had to be gathered and preserved, that money had to be received and disbursed, that advertising contracts had to be serviced, and that some of these activities were even increased by the strike, rather than diminished. Defendant's position that it was best qualified to determine, as it had a right to determine, the extent to which employees' service was necessary in these various areas, and that such services being graduated and employment being correspondingly graduated, resulted in a differentiation in employment. Defendant denies that there was any failure to employ the plaintiffs by reason of their membership in the Guild, as demonstrated by the fact that members of the Guild were em-
[fol. 27] ployed full-time as watchmen and part-time as janitors and elevator operators, as needed.

Plaintiffs rationalize their position by saying that if non-members of the Guild were employed full time and any members of the Guild were employed only part time or not at all during the strike, it follows necessarily that the variation between the two groups flows from a discrimination against the Guild members, and from no other possible cause. Plaintiffs' contention is that the non-Guild group was kept on at full time despite the fact that there was not enough work to keep them busy and that favoritism was shown in protecting their earnings in spite of idleness, as against the partial hiring or nonhiring of the Guild members.

Let's be blunt about it! If this Court could settle this controversy, it could settle the difference between the Western Powers and Russia. I know when I'm licked.

There has been a series of amendments to pleadings, but it is understood that the plaintiffs proceed to trial upon the second amended declaration filed January 2, 1958, to which the answer of the defendants to the original declaration is deemed adequate. In that answer the defendant has pleaded that this court has no jurisdiction of this controversy, a subject which has been preempted by the Labor-Management Relations Act of 1947 (The Taft-Hartley Act). It is stipulated that the defendant corporation is engaged in interstate commerce for the purpose of raising this point. This is a very interesting legal question which I bequeath to the trial judge with my blessing.

With this last word the pleadings are satisfactory, discovery has been completed. No jury has been demanded, [fol. 28] and the trial should require not less than one week.

The question of jurisdiction, above indicated, should properly be disposed of first, before extensive testimony is taken.

This statement should not be regarded as a limitation of the contentions of either party, as set forth in their pleadings. Both parties make extensive claims in detail which are too elaborate to be included in this statement.

[fol. 30] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

DOYLE SMITH, Plaintiff and Appellant,

v.

EVENING NEWS ASSOCIATION, a Michigan corporation, Defendant and Appellee.

OPINION—January 9, 1961

Before the Entire Court.

Kavanagh, J.

Plaintiff and his assignors are employees of defendant Evening News Association and are members of a labor organization, the Newspaper Guild of Detroit. The Guild had a collective bargaining agreement with defendant which provided, among other things:

"There shall be no discrimination against any employee because of his membership or activity in the Guild."

A group of employees of defendant belonging to a union other than the Guild went on strike. Defendant permitted employees of the editorial department, business office and advertising department, who were not covered by a collective bargaining agreement, to report on the premises and they were paid full wages even though there was no work available.

Plaintiff and his assignors were willing to work but defendant permitted only a few to work and, as a result, plaintiff and his assignors lost considerable money in wages.

[fol. 31] Plaintiff contends that defendant's refusal to pay full wages to plaintiff and his assignors and defendant's payment of full wages to other employees constituted discrimination against an employee because of his membership or activity in the Guild and, therefore, was a violation of the contract provision above quoted.

Plaintiff brought this action in the circuit court for the county of Wayne to recover damages for such breach.

Defendant moved to dismiss for lack of jurisdiction on the following grounds:

"1. Defendant is charged with acts which, if true, constitute an unfair labor practice as defined in the National Labor Relations Act, as amended, and

"2. The National Labor Relations Board has been vested by virtue of such amended act with exclusive jurisdiction of the subject matter."

The trial judge granted the motion to dismiss for lack of jurisdiction on the theory that Congress in adopting the

National Labor Relations Act had pre-empted the field and placed the question of a statutory unfair labor practice exclusively within the control and jurisdiction of the National Labor Relations Board.

Plaintiff appeals, and we are presented with the following question:

"Does a State court have jurisdiction of an action at law [fol. 32] by an employee against his employer for breach of a contract between such employer and a labor organization to which such employee belongs where the action is based upon facts which if true would constitute both a breach of such contract and an unfair labor practice under the provisions of section 8(a) of the National Labor Relations Act as amended?"

For the purpose of the decision on this particular motion to dismiss it was stipulated that defendant was engaged in commerce within the meaning of the National Labor Relations Act as amended. It should be further noted that plaintiff failed to bring a complaint to the Board under the unfair labor practices provisions of the National Labor Relations Act until after the expiration of the statutory period provided for the bringing of such complaint.

Plaintiff argues that under the decisions of the United States supreme court Congress has not pre-empted the entire labor field. He contends there are numerous exceptions to the rule. He argues that the case of Garner v. Teamsters Union, 346 US 485, stands only for the proposition that peaceful picketing of the premises of an employer engaged in commerce may not be enjoined by a State court. He points out as an exception to the general rule that in the case of United Workers v. Laburnum Corp., 347 US 656, where plaintiff sought damages in a State court from a union for engaging in coercive conduct, which conduct [fol. 33] was also an unfair labor practice, the United States supreme court affirmed the right of plaintiff to damages against the union on the theory that Congress, in the National Labor Relations Act, had not provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. Plaintiff refers to the case of United

Automobile Workers v. Russell, 356 US 634, where the United States supreme court did not deprive the Alabama State court of jurisdiction where it had allowed an employee to recover damages from a union even where the union's conduct constituted an unfair labor practice and the National Labor Relations Board had jurisdiction to award back pay to the employee. Plaintiff calls particular attention to the fact that in the Russell Case the court indicated there are cases in which there is a possibility that both the Board and the State court have jurisdiction to award lost pay.

Plaintiff contends this is simply an action for damages for breach of contract. He claims State courts have traditional and statutory jurisdiction to grant such relief.

Defendant, on the other hand, relying upon almost the same cases, contends that they hold that pre-emption exists limiting the jurisdiction of State courts in an action for damages for breach of contract when such action also constitutes an unfair labor practice.

[fol. 34] Section 8(a) of the National Labor Relations Act provides in part as follows:

"It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * * (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

Section 10(c) of the act provides in part as follows:

"If upon the preponderance of the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act * * *."

Whether plaintiff can maintain his action in the State court is entirely dependent upon whether Congress pre-

empted the field as to this kind of action and vested exclusive jurisdiction in the National Labor Relations Board. This is, to say the least, a difficult question.

The United States supreme court itself has found difficulty in reconciling the effect and meaning of its decisions on this field of law. It seems we must start with the general premise that Congress has pre-empted the field in labor relations matters affecting interstate commerce and has vested exclusive jurisdiction in the National Labor Relations Board to determine such labor disputes where labor practices are either prohibited or protected by the Labor Management Relations Act.

[fol. 35] In determining whether this is always true we turn to the latest available position on this subject—the discussion in San Diego Building Trades Council v. Garmon, 359 US 236. There, the respondents, copartners in the business of selling lumber in California, began an action in the Superior court for the county of San Diego asking for an injunction and damages. The unions sought from respondents an agreement to retain in their employ only those workers who were already members of the union or who applied for membership within 30 days. Respondents refused until one of the unions had been designated as the collective bargaining agent. The unions began at once peacefully picketing respondents' place of business and exerting pressure on customers and suppliers in order to persuade them to stop dealing with respondents. The trial court found that the sole purpose of these pressures was to compel execution of the proposed contract. The unions protested this finding, claiming the purpose of their activities was to educate the workers and persuade them to become members. On the basis of its findings, the court enjoined the unions from picketing and from the use of other pressures to force an agreement. The court also awarded $1,000 damages for losses found to have been sustained. The United States supreme court granted certiorari and decided the matter along with Gus v. Utah Labor Relations Board, 353 US 1, and Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 US 20, holding that the refusal of the National Labor Relations Board to assert jurisdic-

[fol. 36] tion did not leave with the States power over activities they otherwise would be pre-empted from regulating. In vacating and remanding the judgment of the California court (353 US 26) the United States supreme court pointed out that the Guss and Fairlawn cases involved relief of an equitable nature and controlled the injunctive question, but remanded to the State court the question of whether the judgment for damages would be sustained under California law. On remand, the State court sustained the award of damages. The California court held that those activities constituted a tort based on an unfair labor practice under State law. In so holding, the court relied on general tort provisions of the California civil code as well as State enactments dealing specifically with labor relations. The United States supreme court again granted certiorari. Justice Frankfurter delivered the opinion of the court. After pointing out the difficult situation presented to that court in construing the National Labor Relations Act, he said (p. 240):

"This court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process."

He then discussed all the earlier cases on this subject and concluded by saying (pp. 244-246):

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by section 7 of the National Labor Relations Act, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that State jurisdiction must yield. To leave the States free to regulate conduct [fol. 37] so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial

relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes."

"At times it has not been clear whether the particular activity regulated by the States was governed by section 7 or section 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the act that these determinations be left in the first instance to the National Labor Relations Board. Whatever the scope of this court's authority cannot coexist with a State's power and State jurisdiction too must yield to the exclusive primary competence of the board. See, e. g., *Garner v. Teamsters Union*, 346 US 485, especially at 490-501; *Weber v. Anheuser-Busch, Inc.*, 348 US 468."

"The case before us is such a case. The adjudication in California has throughout been based on the assumption that the behavior of the petitioning union constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the act. It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is arguably subject to section 7 or section 8 of the act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted."

[fol. 38] "To require the States to defer to the primary jurisdiction of the National Board does not require Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by section 7 or prohibited by section 8, then the matter is at an end, and the States

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See *Weber v. Anheuser-Busch, Inc.*, 348 US 468, in which it was pointed out that the State court was not free to disregard restraint of trial statute. Cf. *Amalgamated Workers v. Wisconsin Board*, 351 US 266. The case before us involves a law of general application and specialized labor relations statute.

are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States.[1] However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the general counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this court to decide whether such activities are subject to State jurisdiction. The withdrawal of this narrow area from possible State activity follows from our decisions in Weber and Guss. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

"In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of section 7

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[1] See *Auto Workers* v. *Wisconsin Board*, 336 U. S. 245. The approach taken in that case, in which the court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application.

[2] "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition." *Charleston & W. Carolina R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, 604."

or section 8 of the act, the State's jurisdiction is displaced. [fol. 39] Justice Frankfurter went on to say (pp. 247-248):

"It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers* v. *Russell*, 356 US 634; *United Construction Workers* v. *Laburnum Corp.*, 347 US 656. We have also allowed the States to enjoin such conduct. *Youngdahl* v. *Rainfair*, 355 US 131; *Auto Workers* v. *Wisconsin Board*, 351 US 266. State jurisdiction has prevailed in these situations because the compelling State interest, in the scheme of our federalism, in the maintenance of domestic peace is not overriden in the absence of clearly expressed congressional direction. We recognize that the opinion in *United Construction Workers* v. *Laburnum Corp.*, 347 US 656, found support in the fact that the State remedy had no federal counterpart. But that decision was determined, as is demonstrated by the question to which review was restricted, by the 'type of conduct' involved, i.e., 'intimidation and threats of violence.'"

Justice Harlan, writing a concurring opinion in the same case, in discussing the majority opinion said (pp. 250-254):

"The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all State power. *Hill* v. *Florida*, 325 US 538; *Automobile Workers* v. *O'Brien*, 339 US 454; *Motor Coach Employees* v. *Wisconsin Board*, 340 US 383. That threshold question was squarely faced in the *Russell* case, where the court, at page 640, said: 'At the outset, we note that the union's activity in this case clearly was not protected by federal law.' The same question was, in my view, necessarily faced in *Laburnum*.

"In both cases it was possible to decide that question without prior reference to the National Labor Relations Board because the union conduct involved was violent, and

as such was of course not protected by the federal act. Thus in *Laburnum*, the pre-emption issue was limited to the 'type of conduct' before the court. 347 US, at 658. Similarly in *Russell*, which was decided on *Laburnum* principles, the court stated that the union's activity 'clearly was not [fol. 40] protected,' and immediately went on to say (citing prior 'violence cases'[1]) that 'the strike was conducted in such a manner that it could have been enjoined' by the State. 356 US, at 640. In both instances the court, in reliance on former 'violence' cases involving injunctions, might have gone on to hold, as the court now in effect says it did, that the State police power was not displaced by the federal act, and thus disposed of the cases on the ground that State damage awards, like State injunctions, based on violent conduct did not conflict with the federal statute. The court did not do this, however.

"Instead the relevance of violence was manifestly deemed confined to rendering the *Laburnum* and *Russell* activities federally unprotected. So rendered, they could then only have been classified as prohibited or 'neither protected nor prohibited.' If the latter, state jurisdiction was beyond challenge. *Automobile Workers* v. *Wisconsin Board*, 336 US 245. Conversely, if the activities could have been considered prohibited, primary decision by the board would have been necessary, if State damage awards were inconsistent with federal prohibitions. *Garner* v. *Teamsters Union*, 346 US 485. To determine the need for initial reference to the board, the court assumed that the activities were unfair labor practices prohibited by the federal act. *Laburnum*, *supra*, at 660-663; *Russell*, *supra*, at 641. It then considered the possibility of conflict and held that the State damage remedies were not pre-empted because the federal act afforded no remedy at all for the past conduct involved in *Laburnum*, and less than full redress for that involved in *Russell*. The essence of the court's holding, which made resort to primary jurisdiction unnecessary,

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"[1] *Youngdahl* v. *Rainfair, Inc.*, 355 US 131; *Automobile Workers* v. *Wisconsin Board*, 351 US 266.

"[2] See *Allen-Bradley Local* v. *Wisconsin Board*, 315 US 740.

is contained in the following passage from the opinion in *Laburnum*, *supra*, at 665 (also quoted in *Russell*, *supra*, at 644):

> "'To the extent that congress prescribed preventive procedure against unfair labor practices, that case [*Garner* v. *Teamsters Union*, *supra*,] recognized that the act excluded conflicting State procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties [fol. 41] or liabilities for tortious conduct have been eliminated. The care we took in the *Garner* case to demonstrate the existing conflict between State and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the State procedure would have survived.'

"Until today this holding of *Laburnum* has been recognized by subsequent cases. See *Weber* v. *Anheuser-Busch, Inc.*, 348 US 468, 477; *Automobile Workers* v. *Russell*, *supra*, at 640, 641, 644; *International Assn. of Machinists* v. *Gonzales*, 356 US 617, 621, similarly characterizing *Russell*; see also the dissenting opinion in *Gonzales*, especially at 624-626.*

"The court's opinion in this case cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited. Henceforth the States must withhold access to their courts until the National Labor Relations Board has determined that such unprotected conduct is not an unfair labor practice, a course which, because of unavoidable board delays, may render State redress ineffective. And in instances in which

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* The same view is taken of *Laburnum* and *Russell* in the *amici* briefs filed in the present case by the government and the American Federation of Labor and Congress of Industrial Organizations, the latter stating that "we hope to argue in an appropriate case that the *Russell* decision should be overruled."

the board declines to exercise its jurisdiction, the States are entirely deprived of power to afford any relief. Moreover, since the reparation powers of the board, as we observed in *Russell*, are narrowly circumscribed, those injured by nonviolent conduct will often go remediless even when the board does accept jurisdiction.

"I am, further, at loss to understand, and can find no basis on principle or in past decisions for, the court's intimation that the States may even be powerless to act when the underlying activities are clearly 'neither protected nor prohibited' by the federal act. Surely that suggestion is foreclosed by *Automobile Workers* v. *Wisconsin* [fol. 42] *Board*, 336 US, *supra*, as well as by the approach taken to federal pre-emption in such cases as *Allen-Bradley Local* v. *Wisconsin Board*, supra, *Bethlemen Steel Co.* v. *New York Board*, 330 US 767, 773, and *Algoma Plywood Co.* v. *Wisconsin Board*, 336 US 301, not to mention *Laburnum* and *Russell* and the primary jurisdiction doctrine itself.[5] Should what the court now intimates ever come to pass, then indeed State power to redress wrongful acts in the labor field will be reduced to the vanishing point.

"In determining pre-emption in any given labor case, I would adhere to the *Laburnum* and *Russell* distinction between damages and injunctions and to the principle that

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[5] The court may be correct in stating that 'the approach taken in that case, in which the court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application.' That, however, has nothing to do with the vitality of the holding that there is no pre-emption when the conduct charged is in fact neither protected nor prohibited. To the contrary; that holding has remained fully intact, and, as already noted, underlay the decisions in *Laburnum* and *Russell*.

"[6] If the 'neither protected nor prohibited' category were one of pre-emption, there would be no point in referring any injunction case initially to the Board since the pre-emption issue would be plain however the challenged activities might be classified federally. The same is true of damage cases under the court's premise of conflict. State power would thus be confined to activities which were violent or of merely peripheral federal concern, see *International Assn. of Machinists* v. *Gonzales*, 356 US 617."

State power is not precluded where the challenged conduct is neither protected nor prohibited under the federal act. Solely because it is fairly debatable whether the conduct here involved is federally protected, I concur in the result of today's decision. "

[fol. 43] There can be no question from the concurring opinion of Justice Harlan that he believed the majority opinion had limited the State power to redress wrongful acts in the labor field to the vanishing point, whether the acts were federally prohibited or federally protected. It is equally evident that Justice Harlan and those who concurred in his opinion believed that, where it is fairly debatable whether the conduct involved is federally protected, Congress has pre-empted the field so as to prevent State action.

The question in the instant case, then, is whether the alleged discrimination on the part of defendant-appellee would constitute an unfair labor practice under the National Labor Relations Act, particularly under sections 7 or 8 thereof. It is agreed for the purpose of this case that the action alleged as constituting a breach of contract would also constitute an unfair labor practice. Plaintiff may not characterize an act which constitutes an unfair labor practice as a contract violation and thereby circumvent the plain mandate of Congress—that jurisdiction of such matters be vested in the National Labor Relations Board and that Federal and State trial courts are without jurisdiction to redress by injunction or otherwise unfair labor practices. If the rule were otherwise, then Federal and State courts could assume jurisdiction over all types of unfair labor practices under the guise of enforcing the terms of the collective bargaining agreement, provided the agreement contains terms governing such matters, and [fol. 44] thereby circumvent the plain mandate of Congress.

In the instant case the damages would appear to be the loss of wages. The National Labor Relations Board under section 10(c) of the act has adequate authority to adjust the wrong by requiring the payment of back wages.

Since it is, to say the least, fairly debatable whether the conduct here involved is federally protected, then under

both the majority and concurring opinions of *Garmon*, the judgment of the trial court must be affirmed. Defendant shall have costs.

Signed: Thomas M. Kavanagh, Eugene F. Black, Harry F. Kelly, John R. Dethmers, Leland W. Carr, Talbot Smith, George Edwards, Theodore Souris.

[File endorsement omitted]

[fol. 45]

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, Thomas M. Kavanagh, Theodore Souris, Associate Justices.

48675

DOYLE SMITH, Plaintiff and Appellant,

vs.

EVENING NEWS ASSOCIATION, Defendant.

JUDGMENT—January 9, 1961

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Wayne be and the same is hereby in all things affirmed, and that the defendant do recover of the plaintiff its costs, to be taxed, and that it have execution therefor.

[fol. 46] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 47]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1960.

SMITH, Petitioner,

v.

EVENING NEWS ASSOCIATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—April 7, 1961.

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

May fifteenth, 1961.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 7th day of April, 1961.

[fol. 48]

SUPREME COURT OF THE UNITED STATES

No. 89—October Term, 1961

DOYLE SMITH, Petitioner,

vs.

EVENING NEWS ASSOCIATION

ORDER ALLOWING CERTIORARI—March 26, 1962

The petition herein for a writ of certiorari to the Supreme Court of the State of Michigan is granted. The

Solicitor General is invited to file a brief expressing the views of the United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

March 26, 1962

Mr. Justice Whittaker took no part in the consideration or decision of this application.